IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL ST.NO.40700 OF 2003.

New India Assurance Co.Ltd. ... Appellant.
Versus.
Mohan Baburao Shevale & others. ... Respondents.

Shri P.G.Kinikar i/by Mrs.Rathina Marverman for the Appellant.

CORAM : ABHAY S.OKA, J.

DATED : 8th June, 2006.

P.C.:

1. Heard the learned Advocate appearing for the Appellant on the maintainability of the Appeal. In paragraphs 31 and 32 of the decision of the Apex Court in the case of National Insurance Co.Ltd. v/s. Nicolletta Rohtagi and others (2002 SCC (Cri) 1788), the Apex Court has held as under:

> "31. We have already held that unless the conditions precedent specified in Section 170 of the 1988 Act are satisfied, an insurance company has no right to appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further, the Tribunal does not implead the insurance company to contest the claim, in such cases it is open to an insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against

whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits, in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing appeal on grounds specified in sub-section (2) of section 149 of the 1988 Act. But such application for permission has to be bona fide and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer res integra that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award.

32. For the aforesaid reasons, our answer to the question is that even if no appeal is preferred under section 173 of the 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regards negligence or contributory negligence of the offending vehicle."

2. In this case, it is an admitted position that

the Appellant-Insurance Company did not apply for leave under section 170 of the said Act of 1988 before the Tribunal. This is not a case where the Application was made but the same was rejected by the Tribunal. A perusal of the judgment shows that even the insured filed written statement and contested the claim. In fact the insured examined a witness during the course of trial. Admittedly no defence which is covered by sub-section (2) of section 149 of the said Act of 1988 has been taken by the Appellant-Insurance Company.

3. In view of the law laid down by the Apex Court, the Appeal is not maintainable and the same is dismissed only on the ground that it is not maintainable. No order as to costs.

Judge.